FILED
JUL 20 1998
OFFICE OF THE CLERK

No. 98-182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARMANDO RODRIGUEZ

Petitioner,

against.

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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52pp

QUESTIONS PRESENTED FOR REVIEW

Brief Introductory Statement

Plaintiff, Armando Rodriguez, sued the United States Postal Service under the Federal Tort Claims Act for damages caused by an automobile accident. Rodriguez received in Judgment after a Magistrate's bench trial of only $5,000, that was affirmed by the Second Circuit Court of Appeals.

Plaintiff is aware that this is not the constitutional law kind of case that demands this Court's special attention. Nor does plaintiff believe this a "Traffic Court". But there are fundamental issues of national importance and of interpreting Rule 15 of the Federal Rules of Civil Procedure present herein:

1) the shifting of the burden of proof to defendant to demonstrate comparative negligence, which was not done below;

2) the permitting of defendant to amend its Answer after trial to permit a defense that had to be pleased before trial; and

3) where the Second Circuit's summary decision shows that that Court--perhaps because of the small nature of the case--completely missed the issue of burden shifting to defendant because it found that plaintiff failed to sustain his burden of proof (which the district court had found, and was not even an issue for the Court of Appeals).

QUESTIONS PRESENTED

I. Whether the lower courts made reversible errors in contravention of national law and the substantive law of New York by falling to shift the burden of proof to defendant to show comparative negligence after Rodriguez showed defendant was negligent?

II. Whether the lower courts made reversible errors in violating Rule 15 of the Federal Rules of Civil Procedure by permitting the defendant to amend its Answer after the trial to include a defense that had to pleaded before the trial.

III. Whether the Second Circuit Court of Appeals, in its summary order, erred--actually ignored or misconstrued Rodriguez's argument--by stating that plaintiff had failed to sustain his burden of proof, when that was not even an issue and conceded by defendant (as there was no cross appeal). The corollary question is whether it is a proper use of "summary orders" is to sweep serious arguments under the rug because they are not published, and that as a democratic institution the Court's must at minimum address the actual arguments in the case?

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SUPREME COURT OF THE UNITED STATES

ARMANDO RODRIGUEZ,

Petitioner-Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Respondent-Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI

Jurisdictional Statement

The case originated in District Court under the Federal Tort Claims Act, and final orders were appealed to the Circuit Court. This Petition is from a summary order of the United States Court of Appeals for the Second Circuit filed February 25, 1998. A-1. On April 20, 1998 the Circuit Court denied Rodriguez's motion for rehearing. A-3. Accordingly, the Petition is timely filed pursuant to Rule 13 (3) of this Court. As stated herein the Petition should be granted pursuant to Rule 10 (a) and (c) of this Court as state common law was ignored, interpretation of the Federal Rules of Civil Procedure with respect to amending the Answer, and the Circuit Court has departed from accepted and usual course of judicial proceedings in its use of a summary order to ignore the arguments presented.

Statement of Case

This is an auto crash case under the

Federal Tort Claims Act. It is conceded that the U.S. Postal Service ("USPS") was negligent in hitting plaintiff's car, which was passing through a Queens, N.Y. intersection when defendant entered same. See Memorandum and Order dated April 26, 1995, A-4.

The District Court erred by finding USPS only 25% liable because it erroneously believed that the 'burden of proof' to show the absence of liability remains on the plaintiff after the negligence of defendant is established. Specifically, the court found that plaintiff had to prove he drove through a green light. 11/23/94 Trans., pgs. 463-469, A-8. As can be seen from the transcript the Magistrate had very harsh comments regarding the plaintiff's credibility with respect to Mr. Rodriguez's proofs of going through a green light.

The Court next held a bifurcated trial on damages. The plaintiff submitted proof of severe bodily trauma, injuries to his head, neck back and knee caused by the crashes impact.

The USPS defended on the basis of the 'seat belt defense', although its Answer did not raise it. Answer, A-15. Plaintiff's attorney objected to evidence of that defense, 6/19/95 Trs., p. 529, A-20, but the Magistrate overruled the objection.

On the basis of scientific evidence the Magistrate held that plaintiff's head, neck and back injuries, were caused by his failure to wear a seat belt. 7/5/95 Trs., passim, A-21, The Magistrate allowed USPS to

amend its Answer to include the seat belt defense after the trial was concluded. Id. at p.#696.

The Magistrate then fixed the value of Rodriguez's pain and suffering from his knee injury at $20,000, which was reduced to $5,000 or 25% of that sum in accord with its apportionment. The Magistrate's opinion is replete with negative credibility assessments of the plaintiff with respect to the damages phase.

ARGUMENT

Point I

The lower courts made reversible errors in contravention of national law and the law of New York State by falling to shift the burden of proof to defendant to show comparative negligence after Rodriguez showed defendant was negligent?

Applicable New York law, codified in its CPLR §§ 1411 and 1412, is that plaintiff's culpable conduct must be pleaded and proved by defendant. The burden of proof is shifted by those sections to defendant once any liability is established. Gonzalez v. Medina, 69 A.D.2d 14, 417 N.Y.S. 953 (1979); Yun Jeong Koo v. St. Bernard, 89 Misc. 2d 775, 392 N.Y.S.2d 815 (1977). This is the modern rule prevailing nationwide.

The District Court committed reversible error as a matter of law by holding that even though the USPS was negligent, the burden of proof remained with the plaintiff, so that Mr. Rodriguez had to prove that the

light he went through "was green".

The Second Circuit simply did not address this seminal argument. Rather, their summary order indicates they thought Rodriguez had not made his prima facie case, although that was the predicate for his damage award. Rather defendant presented no evidence whatsoever at trial that Rodriguez went through a red light, and the burden was squarely on it to show some culpable conduct by Rodriguez to reduce the award on principles of comparative negligence.

Point II

The lower courts made reversible errors in violating Rule 15 of the Federal Rules of Civil Procedure by permitting the defendant to amend its Answer after the trial to include a defense that had to pleaded before the trial.

New York's Vehicle and Traffic Law provides that the failure to wear a seatbelt "may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleased such noncompliance as an affirmative defense." §1229c.8. Brodvin v. Hertz, 487 F. Supp. 1336 (SDNY 1980); Costanza v. New York, 174 Misc. 2d 94, 553 N.Y.S.2d 616 (1990) (must be specifically pleased, general allegations are insufficient).

Although USPS did not assert this as an affirmative defense the Magistrate permitted evidence of this defense, and based thereon denied all damages for Rodriguez's head, neck and back injuries. Perversely, the

Magistrate permitted the Answer to be Amended after the trial, see 7595 trans. p. 696-697.

Point III

Whether the Second Circuit Court of Appeals, in its summary order, erred--actually ignored or misconstrued Rodgriguez's argument--by stating that plaintiff had failed to sustain his burden of proof, when that was not even an issue and conceded by defendant (as there was no cross appeal). The corollary question is whether it is a proper use of "summary orders" is to sweep serious arguments under the rug because they are not published, and that as a democratic institution the Court's must at minimum address the actual arguments in the case?

This issue has to do with the Second Circuit's use of summary orders. Clearly the issues presented by Rodriguez were overlooked in the summary order.

This writer is a former law clerk in the Second Circuit in the Court of Appeals, and as such am most respectful of that Court as an institution. It is widely known that the Second Circuit is critically short of Judges.

To my mind their shortage and the nature of the case, does not justify ignoring the simple, lucid and basic reversible errors presented to it by Rodriguez. Frankly, it is these kinds of appeals, the tort cases, that do not on their surface attract judicial attention that require serious appellate review.

A man was injured in a automobile accident. The rules for adjudicating his damages were ignored below at both levels. While it is a shame that Rodriguez needs to ask for this Court's attention, he simply has no where else to go.

It is respectfully requested that the Court grant certiorari herein, and that all such other and further relief as is necessary to effectuate justice be granted.

Respectfully,

Dated: July 8, 1998

ERIC A. KLEIN
Attorney for Petitioner-
Plaintiff-Appellee
ARMANDO RODRIGUEZ
245 East 54th Street
New York, New York 10022
(212) 688-1594

SUPREME COURT OF THE UNITED STATES

ARMANDO RODRIGUEZ,

Petitioner-Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Respondent-Defendant-Appellee.

APPENDIX FOR PETITION FOR A

WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY TO BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RESJUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of February, one thousand nine hundred and ninety-eight.

PRESENT:

Honorable Jon O. Newman, **UNDER SEAL**
Honorable Pierre N. Leval,
Honorable Fred I. Parker,
Circuit Judges.

Armando Rodriguez,

Plaintiff-Appellant
Cross-Appellee.

v. 95-6249(L)
95-6255

United States Postal Service,
Defendant-Appellee
Cross-Appellant.

APPEARING FOR APPELLANT: Eric A. Klein, New York, N.Y.

APPEARING FOR APPELLEE: Sarah J. Lum, Assistant United States Attorney, Eastern District of New York, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Roanne Mann, Magistrate Judge).

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the District Court be and it hereby is **AFFIRMED.**

Plaintiff Armando Rodriguez sued the United States Postal Service for damages resulting from a collision at a traffic light intersection between his car and a van driven by a Postal Service employee. In a non-jury trial, plaintiff was found to be 75% at fault for driving through a red signal and was awarded $5,000 for pain and suffering.

Plaintiff argues on appeal that the district court impermissibly shifted the burden of proof on defendant's comparative negligence defense when it stated that plaintiff had failed to sustain "his burden of proving that he had the green light" on entering the intersection. A20; Blue 2-3. This argument fails. Because traffic lights

are red on one axis while green on the other, the trial judge's statement was tantamount to saying that plaintiff had failed to sustain his burden of proving that defendant drove through a red light. It was indeed plaintiff's burden to show that the defendant was negligent, and he failed to carry it.

Nor did the court abuse its discretion when it granted defendant leave to amend its answer to include a seat belt defense. See Fed. R. Civ. P. 15(b). We have considered appellant's remaining arguments and find them to be without merit.

We therefore **AFFIRM** the order of the district court.

FOR THE COURT:
GEORGE LANGE III, Clerk
By:

"S/_____"
Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20 day of April one thousand nine hundred and ninety-eight.

Rodriguez

v

Dkt No: 95-6249
UNDER SEAL

U.S. Postal Service

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant ARMANDO RODRIGUEZ

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to

the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

"S/ By: _____"
Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARMANDO RODRIGUEZ,

Plaintiff,

MEMORANDUM AND ORDER

-against-

91-CV-2919 (RLM)

UNITED STATES POSTAL SERVICE,

Defendant.

Pending before the Court is defendant's motion, pursuant to Fed. R. Civ. P. 52(b), to amend the Court's findings following a bifurcated bench trial on the issue of liability.[1] Specifically, defendant objects to the Court's conclusion that defendant was comparatively negligent, and 25 percent responsible for the collision, based on the failure of defendant's employee, Roscoe Wright, to have used reasonable care while entering the intersection with his view to left obstructed. (See Tr. 468-69.[2]) Defendant's motion--which is defendant's second attempt to amend the Court's finding

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[1]In a letter dated April 17, 1995, defendant requested that the motion, which had previously been withdrawn without prejudice, be reinstated.

[2]"Tr." refers to pages in the trial transcript.

(see Tr. 470)--is denied.

Under New York law, which applies in this case, a driver who proceeds in the face of a green light may be found partially responsible if he does not use reasonable care to avoid an accident. See Costalas v. City of New York, 143 A.D.2d 573, 575, 532 N.Y.S.2d 868, 869 (1st Dept. 1988), citing, inter alia, Shea v. Judson, 283 N.Y. 393, 398, 28 N.E.2d 885 (1940). Comparative negligence may be found where a driver proceeds "blindly and wantonly" through a green light after observing another care, proceeding in his direction, in or near the intersection, "or if the circumstances and conditions were such that, in the exercise of ordinary prudence, he ought to have made such an observation...." Sontag v. Mulkerin, 63 A.D.2d 699, 404 N.Y.S.2d 697 (2d Dep. 1978); see Kinsfather v. Gruneberg, 47 A.D.2d 789, 790, 365 N.Y.S.2d 903, 906-07 (3d Dept. 1975) (upholding jury finding of 23% liability of driver of car that proceeded through intersection, with green light, while "denied a full view of possibly approaching traffic").

The record establishes that Roscoe Wright did not use reasonable care before entering the intersection. Wright testified that as he began to enter the intersection, the panel truck to his left stopped, obstructing his view; Wright nevertheless proceeded through the intersection. (Tr. 283, 301.) The night was foggy and the ground moist. (Tr. 297-98.) In response to the Court's question as to what he was thinking when the truck stopped, Wright replied: "I just continued going. I didn't

think why he stopped." (Tr. 324.) The Court concluded, and adheres to its conclusion, that a reasonably prudent person driving under those conditions would, at a minimum, have reduced the speed of his vehicle before proceeding blindly through the intersection with his view partially obstructed.

Defendant argues for the first time that Wright "did not have the time to 'reflect on deliberate' about what to do" and thus could not have avoided or minimized the accident. Defendant United States' Memorandum of Law in Support of Its Motion for Reconsideration Under Fed. R. Civ. P. 52(b), at page 5. This contention is undermined by the testimony of defendant's own expert witness, who acknowledged that a driver's "average" or "standard" reaction time is 1.5 seconds, and added that his calculations in this case assumed a reaction time (for plaintiff) of .75 seconds. (See Tr. 370-74.) Notably, defendant's expert was not asked by defense counsel whether, under varying assumptions, Wright would have had sufficient time to avoid or minimize the impact. Thus, the record is devoid of evidence contrary to the Court's conclusion that Wright's negligence contributed toward the collision.

CONCLUSION

Defendant's motion pursuant to Fed. R. Civ. P. 52(b), to amend the Court's findings, is denied. The parties will serve and submit their joint pretrial order (JPTO), using the form previously provided to the parties, by the following dates:

May 3, 1995: Plaintiff will serve its portion of the JPTO;

May 10, 1995: Defendant will serve its portion of the JPTO;

May 17, 1995: The parties will submit the combined JPTO to Chambers.

A final pretrial conference will be held at **noon** on **May 18, 1995**, in Courtroom B.

Trial will commence at **2:00 p.m.** on **May 22, 1995**, in Courtroom B.

SO ORDERED.

DATED: **Brooklyn, New York**
April 26, 1995

"S/_____"
ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARMANDO RODRIGUEZ, Plaintiff,	:	91 CV 2919
v.	:	U.S. Courthouse Brooklyn, New York
POSTAL SERVICE, Defendant.	:	November 23, 1994
	:	10:00 o'clock a.m.

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE.

APPEARANCES:

For the Plaintiff:
HARRY H. LIPSIG & PARTNERS
By: GLEN DOLAN, ESQ.

For the Defendant:
ZACHARY W. CARTER
United States Attorney
By: SARAH LUM, AUSA

Court Reporter:
Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 330-7687

Proceedings recorded by mechanical stenography, transcript produced by CAT.

EXHIBIT A

(Trial resumed.)

(In open court.)

THE COURT: The court is prepared at this time to render its findings of fact and conclusions of law.

MS. LUM: Your Honor, one preliminary matter, if I may.

Mohammed Patel is here pursuant to the subpoena that I had served on him and, in light of your Honor's finding that his testimony is material to this case, we're prepared to move the court to reopen the case for the limited purposes of taking his testimony, if your Honor finds still that his testimony would be material to this case.

MR. DOLAN: Your Honor, obviously, I object. Both parties have rested and a decision has been made. At this time it's far too late to bring in the testimony of Mr. Patel.

Furthermore, as a practical matter, I am not prepared to examine him at this time. I do not have my notes. I certainly did not expect this testimony to come today.

THE COURT: The application to reopen the case is denied.

I'm prepared at this time to render my findings of fact and conclusions of law.

First, the findings of fact.

On the evening of March 14, 1990, sometime between about 9:30 p.m. and 10:00 p.m. plaintiff Armando Rodriguez was driving his Mercury Cougar in the borough of Queens. Also present in the case was Elsa Rodriguez, his wife, who was seated in the front passenger's seat. Mr. Rodriguez was headed east on Metropolitan Avenue in Queens.

Roscoe Wright, a United States Postal Service employee, was driving a Chevrolet Astrovan within the scope of his employment as a postal employee. Wright was headed north on Woodhaven Boulevard at the time of the accident. Mr. Wright came to a stop at the intersection of Woodhaven and Metropolitan. At the time he was in the lane nearest the parking lane, a panel truck was also stopped at the intersection to Mr. Wright's left and was obscuring his view.

As plaintiff Rodriguez entered the intersection of Metropolitan Avenue and Woodhaven Boulevard the traffic signal for eastbound traffic on Metropolitan had just turned red. Meanwhile, when the traffic light for northbound traffic on Woodhaven turned green, Mr. Wright and the truck next to him began to proceed through the intersection. Shortly thereafter the truck stopped. Wright could not see past the truck to his left. Wright did not give any thought as to why the truck had stopped. Instead, he continued, heading through the intersection without changing speed. Rodriguez's Cougar and the van collided in the intersection.

Before I report my conclusions of law, I would just like to say a few words about

the issue of credibility, since both sides recognize that the issue of credibility was critical to this case and, thus, to my findings of fact and conclusions of law.

The account of the accident given by the plaintiff's witnesses and the defendant's witnesses were inconsistent. There were issues of credibility raised as to all of the witnesses. It is, of course, the plaintiff who has the burden of proof. The fact that the plaintiff called three witnesses who were at the scene to testify to what they observed and the fact that the defendant called only one, obviously, is not dispositive. The issue is the weight of the credible evidence.

Mr. Diaz, who was allegedly the one impartial witness who was called by the parties, in my view, there were serious questions raised about his credibility. For example, in his deposition he testified that he had simply assumed that Mr. Rodriguez had the green light. In contrast, at trial he testified unequivocally that he saw that the light had been green.

Observing Mr. Diaz and hearing his testimony, I concluded that it had a rehearsed quality and just by way of example I would note that in their depositions both plaintiff and Mr. Diaz testified not only to markings, postal markings, on the postal van, but also to the postal uniform that was allegedly worn by Mr. Wright. Each of them at their depositions described the uniform and I believe each described the blue stripe on the uniform. In fact, Mr. Wright was not wearing a uniform, as he so testified, and

had never worn a postal uniform as he was not a postal carrier.

Both Mr. Diaz and Mr. Rodriguez changed their testimony at trial and I thought that the consistency in their testimony, the consistency in that error and the consistency in changing that error, I thought was notable.

I believe that that not only raised questions about Mr. Diaz's credibility, but it also raised questions about the plaintiff's credibility.

The plaintiff in his testimony claimed never to have discussed the accident with either Mr. Diaz or with Mr. Patel and that raised serious questions in my mind. Particularly, with respect to Mr. Patel, the plaintiff testified that he had received a call from Mr. Patel and went to meet him but never discussed the accident. When I specifically questioned him about that, he said that when he got the call from Mr. Diaz he said, Well, I'll come over to the gas station and then we can--and the plaintiff hesitated and added the word meet.

In my mind, observing him, hearing what he said, it seemed to me that, in fact, he and Mr. Patel had discussed the accident and that he was falsely denying that he had ever discussed the accident with him.

I give these examples as examples only. In short, I found that the testimony of the plaintiff and plaintiff's witnesses was not sufficiently trustworthy that I could conclude, in light of Mr. Wright's contrary

testimony, that the plaintiff had sustained his burden of proving that he had the green light.

Now, let me just take a moment to address the expert witnesses. As far as I was concerned, the critical question addressed by the experts was whether the evidence indicated that Mr. Wright could have stopped at the crosswalk, as he had claimed in his testimony. The experts did reach contrary conclusions on that issue. However, Mr. Coulon's conclusion was based on an assumption that no braking or steer away of any kind had occurred and I find, in light of the testimony in the case, that that was an assumption that may not have been accurate. So that I do not find that the experts' testimony in any way is inconsistent with my conclusion on the credibility of the parties and the eyewitnesses.

Turning now to my conclusions of law, the law of the State of New York applies in this federal tort claims act case, pursuant to 20 USC section 1346 B.

I conclude that based on the findings of fact that I made that the plaintiff was negligent in that he failed to obey the traffic signal and that was a proximate cause of the collision.

In addition, notwithstanding the light in his favor, Roscoe Wright failed to use reasonable care when with his view to the left obstructed by the panel truck he continued to enter the intersection without reducing his speed, after the truck had

suddenly stopped or slowed down.

Under the doctrine of comparative negligence, a driver who proceeds in the face of a green light may be found partially responsible if he does not use reasonable care to avoid an accident. And I cite the parties to Costalas vs. City of New York, 143 AD 2d, 573, 1st AD-1988.

I further conclude that Roscoe Wright's in attentiveness was a contributing cause of the accident. Walker vs. Dartmouth Plan Leasing, 180 AD 2d 952, 580 NYS2d, 535 3d Dept. 1992.

I further conclude that Mr. Wright's inattentiveness was 25 percent responsible for the accident and that plaintiff's failure to comply with the traffic signal was 75 percent responsible for the accident.

Those are my findings of fact and conclusions of law.

What additional discovery, if any, remains to be taken in the case?

MR. DOLAN: None, your Honor, that I'm aware of.

MS. LUM: Your Honor, there is more discovery that needs to be done, which is the depositions of plaintiff's doctors, which I would like to take and I believe there may be some other discovery that I need too that I will issue

RLB:SJL
F. 9105201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____x
ARMANDO RODRIGUEZ AND
ELSA RODRIGUEZ,

ANSWER

Plaintiffs,

Civil Action
No. CV-91-2919
(Korman, J.)

-against-

UNITED STATES POSTAL
SERVICE and
UNITED STATES OF AMERICA,

Defendants.
_____x

Defendants UNITED STATES POSTAL SERVICE and UNITED STATES OF AMERICA, by their attorney, ANDREW J. MALONEY, United States Attorney for the Eastern District of New York, SARAH J. LUM, Assistant United States Attorney, of counsel, answer the correspondingly numbered paragraphs of the amended complaint[1] of ARMANDO RODRIGUEZ AND ELSA RODRIGUEZ on information and belief as follows:

1. The allegations constitute conclusions of law of which no response is

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[1]Although titled "Amended Verified Complaint," the amended complaint served on the United States Attorney's Office was not in fact a verified complaint.

required.

2. Admit.

3. Admit that Armando Rodriguez and Elsa Rodriguez submitted an administrative claim dated July 2, 1990, claiming a total amount of $2,005, 715.41, which was received by the Postal Service on July 16, 1990. Defendants answer further that on April 24, 1991, the Postal Service received two "supplemental" administrative claims from the plaintiffs as follows: one submitted by Elsa Rodriguez claiming a total of $250,000.00 and one from Armando Rodriguez claiming a total of $1,755,715.41. Defendants answer further that the Postal Service has not issued a final denial with respect to the first claim, which was received on July 16, 1990, nor with respect to either of the "supplemental" claims received on April 24, 1991.

4. The allegations contained in paragraph 4 constitute conclusions of law to which no response is required.

5. Admit.

6. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations, except with respect to the time immediately preceding the collision between the plaintiffs' car and the postal vehicle. As to that particular time on March 14, 1990, defendants deny the allegations contained in paragraph 6.

7. Admit.

8. Admit.

9. Admit.

10. Deny.

11. Admit.

12. Deny.

13. Admit.

14. Admit.

15. Admit.

16. Admit.

17. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations.

18. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations.

19. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations.

20. Deny.

21. With respect to the allegations contained in paragraph 21, defendants repeat and reallege the responses given in paragraphs 1 through 20, which are incorporated herein by reference.

22. Defendants lack sufficient knowledge or information to form a belief as

to the truth of these allegations.

23. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations.

24. Defendants lack sufficient knowledge or information to form a belief as to the truth of these allegations.

25. The remaining paragraph is a request for relief, to which no response is required. Defendants deny each and every allegation of plaintiffs' complaint to the extent not admitted denied, or otherwise responded to herein.

FIRST DEFENSE

26. If plaintiffs are entitled to any recovery for the events complained of, such recovery must be diminished in the proportion which their culpable conduct bears to the culpable conduct which caused the injury, if any.

SECOND DEFENSE

27. The Court lacks jurisdiction over defendant United States Postal Service, pursuant to 28 U.S.C. § 2679(b).

THIRD DEFENSE

28. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the United States respectfully requests judgment dismissing the plaintiffs' complaint together with

costs and disbursements, and such other further relief as this Court deems just and proper.

Dated: Brooklyn, New York
February 4, 1992

ANDREW J. MALONEY
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 11th Fl.
Brooklyn, New York 11201

"S/By:_____"
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
ARMANDO RODRIGUEZ,
:
91CV 2919
Plaintiff,

-against- :
United States Courthouse
Brooklyn, New York

UNITED STATES
POSTAL SERVICE,
:June 19, 1995
Defendant. 9:30 o'clock a.m.
----------X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
EDWARD SIVIN, ESQ.

For the Defendant:
SARAH LUM, ESQ. and
RICHARD HAYES, ESQ.
Assistant United States Attorneys

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: That is fine, you can ask him about that. Let's not go into his education and how many professional societies he belongs to.

MS. LUM: Can I communicate that to Mr. Hayes?

MR. SIVIN: Just one application.

Plaintiff moves to preclude any testimony by Mr. Rosini. The defendant did not pled failure to use seat belts, and New York traffic law requires that be pleaded as an affirmative defense. It was brought up in the liability phase of the plaintiff's memorandum of law --

THE COURT: I'll not preclude him. This hadn't been brought up in this phase of the proceeding. I'm take his testimony and I'll review the previous submissions.

MS. LUM: Richard Hayes will be assisting with the examination of the next witness.

MR. SIVIN: I would ask that the records I'm to review of the inspector, that they remain in the courtroom.

THE COURT: I don't believe that they left the courtroom.

THE WITNESS: I have them here.

MR. HAYES: I don't have any records belonging to any inspector.

THE COURT: I believe the inspector has them.

Would you leave them at Mr. Sivin's desk.

Mr. Hayes, are you going to do the direct

UNITED STATES DISTRICT COURT
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ARMANDO RODRIGUEZ, :
CV 91-2919
Plaintiff, :

-against- :
U.S. Courthouse
Brooklyn, New York
U.S. Postal Service, :
July 5, 1995
Defendant. : 2:00 o'clock p.m.
---------- X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:
EDWARD SIVIN, ESQ.

For the Defendant:
SARAH J. LUM
Assistant U. S. Attorney

Court Reporter:
Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

EXHIBIT B

THE COURT: I am going to stand by my previous ruling.

MS. LUM: Thank you.

THE COURT: Before we proceed with the testimony, there was -- there was one matter that had been left open, and that was the plaintiff's application to, I guess to strike any evidence concerning the government's seat belt defense, and both parties had indicated that they were -- they were going to rest on the submissions that were made to the Court in connection with the joint pretrial order submitted on the liability phase of the case.

I have taken a look at those submissions and I have done some independent research, and I have concluded that the government should not be precluded from relying on the seat belt defense. The plaintiff's argument is that the non-use of the seat belt must be specifically pleased under New York law. The defendant responds that the government need not specifically plead the non-use of seat belt in federal court, and the government further argues that, in any event, the government did plead a failure to mitigate on the plaintiff's part and that that would be sufficient to cover the seat belt defense.

There is case law to the effect that the non-use of the seat belt must be specifically asserted. For example, the southern -- I believe it was Judge Tenny in the Southern District of New York so concluded in the case of Brodvin versus Hertz, recorded at 487 F. Supp. 1336.

However, in that case, the Court went on to rule on a -- on the defendant's motion to amend the answer, to add such a defense. In Brodvin the Court denied the motion but it did so specifically because it felt that under the circumstances of that case, the plaintiff would be prejudiced by such an amendment at that point in the proceeding.

Judge Tenny specifically distinguished a 1976 decision in the Second Department in Wordlaw versus Ford Marketing Corporation reported at 53 AD 2nd 610, and 384 New York Sup 2nd 17. In Wordlaw the Court allowed the defendants to amend their pleading because the Court concluded that there would be no prejudice to the plaintiff.

Furthermore, in the absence of prejudice, a pleading may even be amended after trial to conform to the proof at trial, and the Court noted that in DiMauro versus Metropolitan Suburban Bus Authority reported at 105, AD 2nd, 236, 483 New York subsecond 383, a decision of the Second Department in 1984.

Here, I do not believe that there would be any prejudice to the plaintiff by allowing the government to amend its answer. The discovery on damages in this case was deferred until after the trial on liability. The plaintiff successfully kept out the seat belt defense from the liability phase of the case, and deferred that defense to the damage phase. In other words, the plaintiff was on notice prior to the discovery on damages that the seat belt defense was an issue in the case, and under those circumstances, I see no prejudice to the

plaintiff by allowing the government to amend its answer to specifically allege the plaintiff's failure to have used a seat belt.

So I will permit such an amendment. Ms. Lum, how much time do you need to file an amended pleading? Amendment limited to adding such an affirmative defense?

MS. LUM: It could be done later today.

THE COURT: I will give you until the end of this week, which would be July 7.

MS. LUM: Your Honor, for the record, I know Your Honor has already ruled on this, and I don't want to waste any more of the Court's time, but we have, since I last made that representation to the Court, that we would -- we had briefed it in our earlier papers done some more research and found that it's the federal pleading rules that govern and we believe there is case law to support the prongs that we need not even here in federal court plead that specifically because it is a New York pleading requirement, but, in any event, Your Honor, we will file an amended answer by the end of this week.

THE COURT: Well, you did not at any time advise me that you wished to supplement your prior submission, and while I don't purport to have exhaustive research, I did find the Brodvin case which is a federal case deciding this issue and saying that it should be specifically pleaded, but, in any event, as I have said, I would allow the government to amend its pleading.

MS. LUM: Thank you, Judge.

MR. SIVIN: May I make a brief comment, Your Honor?

Just point out that the government never moved to amend their answer although they had ample opportunity to do so. The issue of their not having raised that defense in their answer was raised months ago.

Moreover, plaintiff will be moving at the end of the government's case to dismiss that defense now that Your Honor has allowed that defense to come in. I am not giving the argument now because the defendant hasn't rested but I do reserve the right to make that motion at the end of the defendant's case.

THE COURT: You can make it. As I said, I really don't see any prejudice to the plaintiff under the circumstances since the plaintiff has been on notice that this issue has been in the case since the liability phase which preceded the discovery on damages, so I don't see how he has been prejudiced in any way.

MR. SIVIN: The motion will be based not only upon the failure of the government to -- to plead that defense, and

THE COURT: Please be seated.

I am prepared at this time to render my findings of fact and conclusions of law with respect to the damages suffered by the plaintiff.

In the liability phase I rejected the plaintiff's testimony and concluded that he went through the red light and was therefore 75 percent responsible for his accident.

As I will detail in a few moments, I again find that I cannot credit the plaintiff's testimony in many material respects.

Based on the testimony of Dino Rossini, I conclude that the plaintiff was not wearing a seat belt at the time of the accident, and that, therefore, he may not recover for injuries that he would not have received had he used the seat belt.

It is, of course, the defendant's burden of proving that some or all of the injuries would have been avoided had the plaintiff used his seat belt.

I find that the plaintiff would not have sustained the laceration to his head from hitting the rear view mirror, or to his teeth from allegedly hitting the steering wheel, had he been wearing the seat belt, and the plaintiff does not seriously contest this.

I find, however, that the government has not sustained its burden of proof with respect to the knee injury. Doctor Rossini

acknowledged that it is harder to determine whether the knee injury could have been avoided with the seat belt. He also added that a side impact as opposed to a rear or frontal impact can create further doubt on this issue.

In addition, the effectiveness of a seat belt in a voiding damage to the lateral portion of the knee or to the lower leg, in this case, the lateral tibial plateau, is less intuitively obvious since a seat belt acts as a restraint from the lap up.

While the plaintiff has offered no evidence with respect to the seat belt defense, it is the government's burden of proof and, accordingly, I find that the government has not sustained its burden of proving that the knee injury would have been avoided with the use of the seat belt.

The plaintiff also claims to have injured his neck and to be suffering from cervical radiculopathy as a result of that injury. According to the government's neurologist Dr. Rosen, a whiplash injury can occur to the cervical spine even without much movement of the torso. Here, however, there was substantial movement of the torso.

I find that plaintiff was not wearing his seat belt and that he therefor slammed his head against the rear view mirror. Accordingly, it is reasonable to conclude that whatever injury plaintiff claims he suffered was far greater than what he might have suffered had he worn a seat belt.

I conclude, in any event, that

plaintiff's neck injury was a relatively minor one. According to the testimony of Dr. Rosen and Dr. Crane, which I credit, there is no objective evidence of radiculopathy or neurological deficits or other defects in the neck.

Dr. Rosen, the neurologist who testified for the government, further stated his opinion that based on the records he reviewed, the plaintiff was not at any time suffering from cervical radiculopathy.

Now, this conclusion is contrary to the testimony that was provided by Dr. Wiseman. I found that Dr. Wiseman was far too willing to color his testimony in an effort to help this plaintiff and I therefore discount his opinion.

That leaves the question of the effect of plaintiff's failure to use a seat belt on plaintiff's alleged back injury. I don't reach this question as I conclude that the plaintiff hasn't established that his back was injured as a result of the accident.

First of all, my review of the record reflects that Dr. Wiseman did not testify to any such causal connection. In particular, on page 169 of the transcript, he was asked the following question and gave the following response:

Doctor, do you have an opinion with a reasonable degree of medical certainty as to the cause of the diagnoses you have just given Mr. Rodriguez? What's the cause of his cervical radiculopathy?

Answer: Due to the accident that he had.

The next question: Do you have an opinion with a reasonable degree of medical certainly whether these conditions that you testified to are permanent?

Answer: Yes.

Then he goes on an testifies to other matters, but as I read that question and answer, the question while initially framed broadly was narrowed to ask what was the cause of the plaintiff's cervical radiculopathy, and his answer was restricted to that injury.

In any event, even if he had testified to such a relationship, such a causal connection is contrary to the other evidence in the case.

A CAT scan taken in October of 1990 showed degenerative disc disease. Doctors Crane and Rosen viewed the plaintiff's MRI's. They found no herniated disc or bulge.

Although the government's two experts were not radiologists, both of them do have substantial experience in their daily practices of reading MRI's.

The plaintiff was given an opportunity to call a radiologist. He declined to do so. Under these circumstances, I conclude that the plaintiff has not proved that his back was injured in the accident, any back pain that he may be suffering from or may have suffered from is equally or more

consistent with degenerative disc disease, exacerbated by the plaintiff's overweight condition.

I must now determine the extent of the plaintiff's injuries and the value of his economic loss and pain and suffering.

The plaintiff has had made it difficult by exaggerating and, indeed, faking his difficulties to such a degree that I cannot and will not rely on any of his subjective complaints. For example, he testified at trail at page 43:

My life is laying down in bed most of the day.

And at page 50:

I leave the house rarely to occasionally.

He gave similar testimony at his deposition.

Then I watched video tapes of a man who rarely stays at home, who spends much of his time visiting auto and home fix-it shops, who can repair cars and bend and lift his arms and dash across the street, and perform myriad movements inconsistent with the allegedly permanent injuries that he claims to be suffering.

I have also seen credit card records that show a life that has few limitations in terms of movement.

I cannot accept the feeble attempt of

the plaintiff and his treating physician to explain away these activities by saying that the plaintiff has good days and bad days. The only bad days that I witnessed were the days that the plaintiff appeared in court and put on an unconvincing show for my benefit.

In short, I conclude that the plaintiff is a malingerer. He would say whatever he deems expedient at the moment, as evidenced by his false claim of employment on the one credit card application that was admitted into evidence.

Furthermore, I am entitled to draw an adverse inference from his invocation of his Fifth Amendment privilege in response to questions concerning other claims of employment on other credit card applications.

As distasteful as it is to grant any award to a man who repeatedly perjured himself, and apparently induced his wife to do so as well, the fact remains that the plaintiff did in fact suffer a knee injury in 1990 and I find that it was a serious injury within the meaning of New York's no-fault law.

I further find, however, that notwithstanding the presence of hardware in his knee, that plaintiff is not permanently disabled from employment as a result of this or any other injury suffered in the accident, nor is his activity otherwise limited as a result of any such injuries.

The plaintiff claims that he's

permanently disabled and the government put on evidence that he was not disabled when he visited Doctors Crane and Rosen years after the accident.

Neither party has offered any evidence as to the usual period of recuperation from the kind of surgery that the plaintiff underwent to repair his knee; specifically, open reduction and internal fixation.

The plaintiff did offer into evidence a decision of an ALJ with the Social Security Administration who determined in August of 1993 that plaintiff was disabled. However, that determination was made without a hearing, and applying what the ALJ referred to as "the treating physician rule," it was based largely on the information provided by Dr. Wiseman, whose opinions I do not credit.

In addition, I would note that through the plaintiff's testimony about his credit card purchases in 1993, it appears that the plaintiff was to leading the sedentary life that he then claimed to be leading in 1993, when the Social Security Administration report was issued.

With respect to the Workers Comp report, I have reviewed that an although the report concludes that he was permanently partially disabled, the report which is about half a page, all of the findings that precede it would seem to indicate that this a man who was not disabled, and I find that absent compelling reasons that are set forth in the report, I decline to rely on the Workers Comp report.

Based on my own knowledge gleaned from presiding over numerous other similar or analogous personal injury cases, I conclude that the plaintiff was disabled from working for a period of no more than about six to nine months. Giving the plaintiff the benefit of the doubt and assuming that he couldn't work through 1990, and using Dr. Seplaki's figure of $23,053 for lost wages for the nine and a half months remaining in 1990, that would mean that at most the plaintiff's lost wages including fringe benefits would be that figure of $23,053.

Now, whether I conclude that he was disabled from working for six or nine months turns out to be immaterial because of the rule under the no-fault law, that the first $50,000 of basic economic loss is in any event deducted, and this is a principle that plaintiff does not take issue with.

The proof that was submitted of plaintiff's medical expenses consisted of a stipulation that the plaintiff received Workers Comp payment payments of $24,057.07 for medical expenses. Adding the twenty-four thousand dollar figure and the twenty-three thousand dollar figure together still results in an amount that does not exceed the fifty thousand that would have to be deducted for basic economic loss.

I decline to award any amount for the value of domestic repairs during any period of incapacitation. The only proof as to the plaintiff's previous domestic activities was the uncorroborated testimony of the plaintiff and his wife, which I decline to credit.

That brings me to the issue of pain and suffering. I find that a reasonable sum for pain and suffering is $20,000. Any neck injury that the plaintiff would have suffered had he been wearing a seat belt would have been relatively minor and is more than amply compensated by the sum of twenty thousand, so that is twenty thousand for any neck injury and for the knee injury.

Plaintiff has not proven any property damage to his car.

Therefore, the plaintiff's total damages in this case would be $20,000 for pain and suffering, which must be reduced by 75 percent to reflect the plaintiff's own comparative negligence.

Therefore, I conclude that judgment should be entered in this case in plaintiff's favor in the amount of five thousand dollars.

THE COURT: (Continuing)

A judgment will be entered tomorrow.

MS. LUM: In light of your Honor's decision, does your Honor require the defendant still amend its answer, file that by the end of this week? I'm happy to do that. I just wasn't sure.

THE COURT: Why don't you file it by tomorrow?

MS. LUM: Very well.

THE COURT: Is there anything further?

MS. LUM: No, your Honor, thank you.

(Whereupon this matter was concluded for this date.)